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ABSTRACT

In a federal court case (Timothy W. versus Rochester School District), a public school district was relieved of any obligation to provide special education services for a disabled child who was considered incapable of benefiting from educational services. This case has raised significant questions regarding the scope of school districts' obligations under the Education for All Handicapped Children Act (EHA). The judge reasoned that the ability to benefit from instruction is a prerequisite to the school district's provision of educational services, and that children who do not have learning capacity are not intended to receive special education. The judge noted that the child must be evaluated regularly for signs of development which indicate a capability to benefit from special education. This case has significant implications for school districts in terms of: (1) making threshold judgements regarding whether specific handicapped children are covered by the EHA, and (2) determining responsibility for maintenance costs associated with severely handicapped children's residential placements. Discussed in this bulletin are the legal precedents supporting the court decision, the reaction of advocacy groups for the handicapped, and the question of expending funds from educational budgets to support residential placements. (JDD)

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POLICY BULLETIN

Consortium on Educational Policy Studies
BLOOMINGTON, INDIANA

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Must Public Schools Provide Services for Severely Handicapped Children?

Martha McCarthy

In July 1988, for the first time a federal court ruled that a child was too severely disabled to be entitled to educational services under the Education for All Handicapped Children Act (EHA) of 1975. In this case, *Timothy W. v. Rochester School District* (1988),[1] the New Hampshire federal judge relieved the public school district of any obligation to provide special education services for a disabled child who was considered incapable of benefiting from educational services. This decision, which has been appealed to the First Circuit Court of Appeals, has created quite a stir among advocacy groups for the handicapped (Hume, 1988a).

The *Timothy W.* case raises significant questions regarding the scope of school districts' obligations under the EHA. To qualify for EHA federal aid, state and local education agencies must comply with detailed guidelines regarding the identification and placement of handicapped children to assure them a free, appropriate education at public expense. Prior to the *Timothy W.* decision, most controversies focused on the *types* of educational programs and related services that must be supported by school districts under the EHA rather than on *whether* specific severely handicapped children were entitled to *any* educational services.

The *Timothy W.* Case

The controversial New Hampshire decision focused on a 12-year-old boy, Timothy, who was severely brain damaged, non-ambulatory, quadriplegic, and cortically blind. The hearing officer had ruled that Timothy qualified for special education, reasoning that under the EHA *all* handicapped children are entitled to individualized education programs (IEPs), "regardless of the severity of their handicaps" (*Timothy W.*, 1988, p. 4).

The federal district court judge, however, disagreed. The judge concluded that if a child is incapable of cognitive learning, he or she is *not* entitled to an IEP under the EHA. The court ruled in part on the 1982 decision, *Board of Education of the Hendrick Hudson Central School District v. Rowley*, in which the U.S. Supreme Court held that handicapped children were not entitled to programs that would maximize their potential, but rather to personalized instruction and support services necessary for them "to benefit from the instruction" (p. 188–189). The New Hampshire judge reasoned that under *Rowley*, "ability to benefit" is a prerequisite to the school district's provision of educational services. The judge declared: "It logically follows that a handicapped child who . . . does not have learning capacity was not intended to receive special education under the [EHA]. Surely, Congress would not legislate futility!" (*Timothy W.*, 1988, p. 9).

The New Hampshire judge found support for this reasoning in a 1985 decision, *Parks v. Pavkovic*, in which the Seventh Circuit Court of Appeals indicated that children incapable of learning would not be entitled to IEPs under the EHA. Although the court in *Parks* invalidated an Illinois law requiring parents to contribute to their developmentally handicapped children's living expenses in private facilities, the court noted that children who are "wholly uneducable" fall outside EHA protection, even though their handicaps are more severe than the handicaps of children protected by the Act (p. 1405). The ap-

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peals court further commented regarding the fiscal problems faced by school districts in serving severely handicapped children: "It can be argued that the limited funds allocated for the education of the handicapped children could be employed more productively on a child likely to make real educational progress with their assistance than on one too severely retarded to benefit much at all" (*Parks*, 1985, p. 1405).

The New Hampshire judge concluded that both the EHA and state law require a threshold determination regarding whether a specific child can benefit from special education. To make this determination, the judge relied on expert testimony regarding Timothy's capabilities. After reviewing divergent perspectives presented by various medical and teaching personnel as to Timothy's ability to benefit from education, the judge reached the "regrettable conclusion" that Timothy's potential for learning seemed "non-existent" (p. 22). Noting that the child's activities were passive (with little, if any, purposeful movement), the judge reasoned that the greatest service that society could provide for Timothy would be to alleviate his pain and suffering "and provide him a comfortable and secure living environment" (p. 22). Accordingly, the judge held that the school district was not obligated to provide special education services for the child, and its motion for summary judgment was granted. The judge did note, however, that the child must be evaluated regularly for signs of development which indicate a capability to benefit from special education.

Implications

Is the *Timothy W.* decision simply an anomaly that will be overturned on appeal, or should it be given serious consideration? Prior to this decision, the federal judiciary generally placed responsibility on the education agency for maintenance costs associated with severely handicapped children's residential placements.[2] If *Timothy W.* is affirmed, it could add a new dimension to the law governing the rights of handicapped children which would have significant implications for the obligations placed on school districts. Under such a precedent, before assessing whether given programs are appropriate, hearing officers and the judiciary would be faced with a threshold decision regarding whether specific handicapped children are covered by the EHA at all. The testimony of education and medical experts would play a key role in deciding whether a child with severe disabilities is capable of benefiting from special education.

Advocacy groups on behalf of the handicapped are fearful that if the *Timothy W.* decision is affirmed by the First Circuit Court of Appeals, it might result in determinations that a number of severely handicapped children are uneducable and thus not entitled to IEPs. The Association for Retarded Children (ARC), the Disability Rights Education and Defense Fund, and the Council for Exceptional Children submitted friend-of-the-court briefs on behalf of Timothy (Hume, 1988a). John MacIntosh, the attorney representing ARC, has asserted that the EHA was intended to cover *all* handicapped children, with a priority given to children with severe disabilities. Thus, according to MacIntosh, the federal court's decision in *Timothy W.* "really turns the federal statute on its head" (Hume, 1988a, p. 3). The Justice Department has also issued a statement that all children with disabilities are entitled to IEPs under the EHA, and it is not the role of federal courts to set a threshold that excludes certain severely handicapped children (Hume, 1988b).

However, with fiscally strained school districts and the federal government's failure to appropriate the promised level of funds under the EHA, some state and local education agencies are questioning the justification for placing additional stress on educational budgets to support residential placements for children with severe disabilities. There is mounting sentiment in educational and political forums that demands to provide noneducational services for severely handicapped children are diverting funds from the school's educational mission. Gwen Gregory, attorney for the National School Boards Association, has noted that the *Timothy W.* case raises the issue of whether public schools are being required to provide services beyond the intent of the EHA (Hume, 1988a). Gregory has asserted that school districts should not be obligated to provide services if a child cannot benefit from special education. In essence, where a handicapped child's placement is primarily custodial in nature, with minimal

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educational benefits, the public school district should not bear total responsibility.

The *Timothy W.* case has indeed focused attention on complex questions that do not lend themselves to simple answers. Should the public school district's responsibility toward handicapped children vary depending on the severity of the disabilities? If so, where should the line be drawn to distinguish "custodial" from "educational" placements, and who should make this determination? If public schools are not held responsible for serving handicapped children with severe disabilities, which agencies will be responsible for ensuring that these children receive services to enable them to attain the degree of self-help possible? These are simply a few of the questions facing the First Circuit Court of Appeals as it considers the appeal of the *Timothy W.* decision. And regardless of how the appellate court rules, this case seems destined to spark additional debate in educational and political forums.

Notes

1. For a more detailed analysis of litigation pertaining to severely handicapped children and the implications of the *Timothy W.* decision, see McCarthy, M. M. (in press). The public school's responsibility to serve severely handicapped children. West's *Education Law Reporter.*

2. *See* Vander Malle v. Ambach, 667 F.Supp. 1015 (S.D.N.Y. 1987); Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986); David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), *cert. denied,* 475 U.S. 1140 (1986); Clevenger v. Oak Ridge School Bd., 744 F.2d 514 (6th Cir. 1984); Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983). But some courts have recognized limitations in terms of services that must be provided as well as expenses that must be incurred by school districts. *See* A. W. v. Northwest R-1 School Dist., 813 F.2d 158 (8th Cir. 1987); Martin v. School Bd. of Prince George County, 348 S.E.2d 857 (Va. App. 1986); Hendry County School Bd. v. Kujawski, 498 So.2d 566 (Fla. App. 1986); St. Louis Developmental Disabilities Treatment Center Parents' Ass'n. v. Mallory, 767 F.2d 518 (8th Cir. 1985); Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983), *cert. denied,* 464 U.S. 864 (1983); Department of Educ. v. Katherine D., 727 F.2d 809, 813–814 (9th Cir. 1983), *cert. denied,* 471 U.S. 1117 (1985).

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